



POLICE DEPARTMENT

June 13, 2008

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Detective Arthur Barragan
Tax Registry No. 892757
83 Detective Squad
Disciplinary Case No. 82951/07

The above named member of the Department appeared before me on February 12, 2008, charged with the following:

1. Said Detective Arthur Barragan, assigned to the 83 Precinct, on or about May 30, 2006, while off duty, having been involved in a police incident, did thereafter fail and neglect to report said incident to his Commanding Officer, as required.

PG 212-32 Page 1, Paragraphs 1 & 2 – OFF-DUTY INCIDENTS INVOLVING
UNIFORMED MEMBERS OF THE SERVICE

2. Said Detective Arthur Barragan, assigned as stated in Specification #1, on or about December 10, 2006, in [REDACTED], did wrongfully engage in conduct prejudicial to the good order, efficiency, and discipline of the Department, to wit: said Detective engaged in an altercation with an individual known to the Department, which resulted in an injury to said individual's jaw. (As amended)

PG 203-10 Page 1, Paragraph 5 – PROHIBITED CONDUCT

The Department was represented by Eric Hicks, Esq., Department Advocate's Office, and the Respondent was represented by Peter Brill, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges and a stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty of Specification No. 1 and Not Guilty of Specification No. 2.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Detective Regina Tucker and Sergeant Tobia Hunter-Clark as witnesses.

Detective Regina Tucker

Tucker is a 17-year member of the Department currently assigned to the Chief of Detectives Investigations Unit (CDIU). She has been assigned to CDIU since November 2006 and her duties include investigating members of the Detective Bureau. Tucker testified that she was assigned to investigate a case involving the Respondent in December 2006.

On January 3, 2007 Tucker testified that she worked a tour on January 4, 2007. During the course of that tour, she initiated a telephone conversation with Debra [REDACTED]. Tucker explained that an incident took place between the Respondent and Debra on December 10, 2006. Debra informed her that she went to her residence that she shared with the Respondent to pick up some of her property. While she was there, Debra found that her property was not in the house, but in a van and she became angry. Debra hit the Respondent, and she also obtained a camera and exposed the film contained in it. A physical altercation ensued, where the Respondent hit Debra.

Debra tried to get her cell phone to call the police, but the Respondent took the cell phone from her. She attempted to use the house phone but was unsuccessful. Eventually Debra left the house and spoke to neighbors.

Debra told Tucker that she went to a neighbor's house and the neighbor called the police. She stated that she was struck in the jaw that evening and went to the hospital. Tucker could not recall if Debra informed her of where she sought treatment, but she was treated for a dislocated mandible jaw.

During cross-examination, Tucker acknowledged that the only recording of the conversation she had with Debra was a worksheet. She admitted that there was no tape recording of that telephone conversation. When questioned as to whether she took notes during the telephone conversation, Tucker responded that her conversation was based on a report prepared by the duty captain. She explained that when she spoke to Debra, she made sure that the story was the same as the information Debra had given to the duty captain. Tucker denied taking any handwritten notes during the conversation. Tucker stated that she did not know whether Debra had a dislocated mandible jaw prior to the date of the incident with the Respondent.

Tucker stated that Debra had already moved out [REDACTED] on the incident date December 10, 2006. She acknowledged that the Respondent was actually the primary caregiver of the children. She stated that after Debra discovered that her possessions were not in the home but were in a van, she became upset. Tucker acknowledged that Debra was the aggressor in that she punched the Respondent on the head with a closed hand and threw a plate at him.

Tucker was told that her worksheet indicated that the Respondent hit Debra on the left side of her face with his open hand. She explained that that meant the Respondent slapped Debra in the face. She stated that the description she gave in her worksheet was the extent of Debra's description of the physical interaction between herself and the Respondent. There was no other aggressive action by the Respondent according to Debra. She then left the home and called the police, Tucker stated that the [REDACTED] Police Department responded to the incident. They prepared a domestic incident report, as well as took written statements from both the Respondent and Debra. She also stated that the [REDACTED] Police Department prepared an Aided Report indicating that Debra sought medical attention at [REDACTED] Hospital. Tucker acknowledged that despite Debra receiving treatment, no action such as the arrest of the Respondent was directed by the [REDACTED] Police Department.

Following her initial visit to the hospital, Tucker stated that Debra chose not to seek any follow-up medical care. She explained that she took a few days off from work, but did not seek any further medical attention. Her follow-up care included putting ice on her face, eating soft food, and resting her jaw.

Upon questioning by the Court, Tucker stated that Debra wrote her own statement in the [REDACTED] Police Department report. [Respondent's Exhibit (RX) A]. Debra stated in the report that the Respondent hit her with an open right hand on the left side of her face causing pain to her jaw and face. Tucker stated that Debra's description of what transpired was consistent with the duty captain's report. She stated that the duty captain's report indicated that Debra was struck with an open hand to the face, although it did not indicate whether it was the right or left side.

During further cross-examination, Tucker read the following statement from the victim statement of allegations:

"I returned to my house [REDACTED] to pick up [REDACTED] and saw that [REDACTED] had put my personal belongings in the van. We started to argue. I threw a plate at him and it broke. I went to take the camera and he tried to grab it. I got hit in the jaw/face (left-side) with an open hand. I went next door and dialed 911." Tucker acknowledged that there appeared to be a victim signature on the Domestic Incident Report that she just read.

Sergeant Tobia Hunter-Clark

Hunter-Clark is a 12-year member of the service currently assigned to CDIU. She has been assigned there for the past three-and-a-half years and her duties include primarily conducting internal investigations. Hunter-Clark testified that she worked a tour on January 23, 2007 and during the course of that tour she had a conversation with Dennis O'Brien (O'Brien). She stated that the conversation took place at his residence located in [REDACTED]. She was informed by O'Brien that on the incident date of December 10, 2006, he and his wife arrived home to find the Respondent and [REDACTED] on their porch. He immediately went toward the Respondent and his wife went toward [REDACTED]. His wife entered the O'Brien home with Debra and he remained outside on his porch and conversed with the Respondent.

O'Brien informed Hunter-Clark that the Respondent told him he had an altercation with [REDACTED] over a camera. Debra started hitting him and in response he used his reflexes and hit her back. Hunter-Clark said she also had a conversation with O'Brien's wife on that date. She informed Hunter-Clark that she and Debra entered the O'Brien residence and Debra was very

distraught and upset. Debra had a difficult time verbalizing her feelings but eventually told O'Brien's wife that the Respondent hit her. Debra was very concerned about her jaw and her mouth and wanted to know if there was any bruising in that area. She also inquired as to whether there was any indication that her face had suffered any type of injury.

During cross-examination, Hunter-Clark acknowledged that the only record of the interviews she conducted with the O'Briens were two worksheets. When asked whether she took any notes during the time of the interviews, she stated, "I probably did. I can't say for certain." She stated that if she had notes they probably had been destroyed. She noted that she did not make any tape recordings or videotape of any of the interviews that she conducted. She also acknowledged that the O'Briens did not actually witness the incident which took place inside the Respondent's residence. Hunter-Clark stated that each interview with the O'Briens lasted approximately 20 to 30 minutes. She admitted that her conversation with O'Brien's wife was reduced to one large paragraph and one small paragraph. With respect to O'Brien, she admitted that her interview was reduced to two small paragraphs. Hunter-Clark explained that during the course of the conversations, they discussed things that did not pertain to the case. She recalled that the O'Briens had relatives who were members of the service and that they had small conversation about that.

Hunter-Clark acknowledged that the worksheets she prepared were not verbatim recitations of the actual discussions she had with the O'Briens during their interviews. She explained that as much as she could recollect from the interviews was put on paper. She further explained that when she conducts an investigation, she makes a scratch copy of the information and anything that she feels is relevant she puts in the worksheet. She acknowledged, however, that her scratch copies were not available for examination.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent also offered into evidence a one-page document, a Domestic Incident Report prepared by the [REDACTED] Police Department dated December 10, 2006 (RX A).

The Respondent

The Respondent has been a member of the Department for over 20 years and is currently assigned to the 83 Detective Squad. He has been a Detective 2nd grade for a year-and-a-half and prior to that he was a Detective 3rd grade for almost ten years. He has been assigned to the 83 Precinct for approximately eight years. The Respondent stated that he is currently not on any type of performance or force monitoring by the Department, and he has never had any excessive force complaint against him substantiated by the Civilian Complaint Review Board. He estimated that he has made approximately 700 arrests in his career. The Respondent said that with regard to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Respondent testified that his [REDACTED] home was in [REDACTED]. He stated that his children currently reside with him. The Respondent explained that once his [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Respondent explained that Debra mentioned to him that she wanted a divorce. The married man she was seeing eventually left his wife. The Respondent stated that he did not pay attention to her request to move out. Debra began to sleep separate and apart from him and on several nights she would spend the night at her boyfriend's apartment. She would do this while he tended to the kids and made sure that his son went to school. The Respondent explained that he had spoken to attorneys and had decided that he did not want to leave the marital home nor leave his children.

On May 30, 2006, Debra had just come home that morning after spending the night at her boyfriend's house. He explained that he and Debra had a meeting scheduled at the school district with respect to their son who was [REDACTED]. As the Respondent drove the car containing his daughter and wife, Debra began to punch him in the face, ripping his glasses off. The Respondent explained that he did not touch her at all. He just continued driving doing his best to prevent himself from having a car accident. After they left the meeting at the school district, while back in the vehicle, Debra told the Respondent to take her to her attorney's office. The Respondent said that he felt Debra wanted him out of the house and she would make some allegations against him, so he decided to go to the local police precinct first to file a report. He stated that at no point did he notify the Department about this incident that took place. He felt

that there was a distinction between the police responding to his residence and him actually going to a police station house to file a complaint. He said that this was ignorance on his part and he apologized for not notifying the Department of the May 30, 2006 incident. He thought that once police officers responded to his residence he had a duty to inform them that he was a member of the service, and that is why he notified the Department of the December 10, 2006 incident.

The Respondent explained that following the May 30, 2006 incident, Debra decided that she wanted to reconcile with him. He stated that they spoke and started attending couples therapy and tried to work things out to save their marriage. He said that once he was promoted to the rank of Detective 2nd grade he noticed that there was a slight change in Debra. A few weeks later in September 2006 she decided that she still wanted to separate. Initially he told her that he would move out and find an apartment and she could stay with the kids. The next day he cried and decided that he did not want to move out and leave his children. Once he advised her that he decided he was not going to move out, Debra became upset. On November 1, 2006, she decided that she was going to move out and she, in fact, moved out.

On December 10, 2006 the Respondent testified that he was going to work a 4 p.m. to 1 a.m. shift that evening. Debra was supposed to come over and pick up the children and take them back to her apartment. He explained that she had left a few things in the house since her move on November 1, 2006. He had taken her items and placed them in the minivan so that when she returned she could take them back to her new residence. When Debra arrived at the house and found that her items were placed in the van, she became upset. Debra took a plate, threw it at the Respondent, and hit him in the shoulder and neck area. The plate then fell to the ground. The Respondent explained that his son was present during that incident. He saw that his

son was becoming upset and knelt down beside him and told him that everything would be okay. Debra then walked over to their son and told him that she was the victim in this whole process. The Respondent said as he went over to pick up the dustpan to pick up the pieces of the broken plate, as he bent down, Debra came over and punched him in the back of his head.

The Respondent explained that he immediately felt that he wanted Debra to leave the home and take the children with him. She then demanded the camera. The Respondent explained that he had the camera and that he had used it the night before. Some friends had come over and helped him and his children decorate their Christmas tree for the holidays. He stated that there were six shots left on the camera. He told his wife that he had no problem giving her the camera but if she would allow him to just take the remaining shots and he could remove the film and she could have the camera. The Respondent said to Debra, "Don't ruin the film." His wife grabbed the camera while he was holding it and they were tugging back and forth with the camera. The Respondent describes that with the tugging of the camera, "with my hand, I strike her on the side of the face." At that point Debra began screaming, "You broke my jaw, you broke my jaw, I'm calling the police on you." Debra then began to run out of the house toward the O'Brien residence. The Respondent stated that he knew she was going to call the police and that the [REDACTED] Police Department was going to respond.

The Respondent testified that he went outside on his front lawn. When he saw the O'Briens he stepped back and went in to check on his children. Later he had a discussion with O'Brien but he never stated that he slapped Debra or punched her. Uniformed members of the [REDACTED] Police Department responded. He advised the first officer he saw that he was a member of the New York City Police Department and they immediately started an investigation. Lieutenant Staley conducted the investigation and interviewed him. The Respondent said that

Debra had gone to the hospital and Staley went to the hospital to see Debra. Before Staley left, the Respondent contacted his own commanding officer, a lieutenant, and informed him of the incident he had with his wife. The Respondent also called Operations and spoke with a Duty Captain Lombardi from Queens South.

The Respondent stated that to his knowledge members of the Department, as well as members of the [REDACTED] Police Department were aware of what was going on in this incident and that Debra had gone to the hospital. The Respondent estimated that the investigation ended sometime around 3 o'clock in the morning and he still went to work sometime around 7 o'clock. He estimated that he took between three to four hours of lost time during that tour. He stated that Lombardi did not come to the scene of the incident and the investigation was left to the [REDACTED] Police Department. The Respondent noted that he was not arrested as a result of the [REDACTED] Police Department investigation. He stated that before he left for work, Debra had returned from the hospital and took the children with her. He stated that he had a chance to see Debra before she took the children and that she did not appear to have any injuries. He was aware that the next day Debra took off from work and kept the children with her. The next time he saw Debra was two days later and she was still angry with him but again she did not appear to have any injuries.

During cross-examination, the Respondent acknowledged that Debra threw a plate at him and struck him in the shoulder area. He also admitted that while he was cleaning up the broken plate, she hit him with her fist. He estimated that it took approximately five minutes between Debra striking him and the incident they had with the camera. When asked why he did not just let Debra take the camera and leave with the children, the Respondent explained that he had taken pictures with friends and his children decorating the Christmas tree. He thought they were

nice pictures and he did not want her to leave with them. He acknowledged that there was no indication that she was going to do anything with the film. He admitted that he would do anything to avoid a conflict with her. The Respondent explained that he did not see a problem with taking the last six shots of the film in the camera and then allowing Debra to have the camera. The Respondent acknowledged that eventually Debra did expose the film in the camera. He stated that he became upset but he denied striking her in the face.

The Respondent acknowledged that on December 10, 2006, he did not call the police to report the incident. He stated that Debra ran out of the house and he knew she was going to call the police. He noted that he made a notification to the Department after the police arrived. The Respondent testified that the [REDACTED] Police Department never gave him the option of having Debra arrested. He stated that he did not think having her arrested would have helped the situation. He further stated that he was not arrested because he did not do anything wrong.

The Respondent stated that he heard Hunter-Clark testify that he and Debra were on the O'Briens' porch when the O'Briens came home. The Respondent said that they were not on the porch but in fact were on the front lawn when the O'Briens pulled up in their vehicle. He estimated that it took approximately a minute for the O'Briens to pull up and for him to actually go over to the O'Briens' house. The Respondent acknowledged that he left his children in his house. He also admitted that he ran to the O'Briens' house after Debra. The Respondent said that he has been neighbors with the O'Briens since May 2001 and he has never had any problems with them. He said that there was no reason for the O'Briens to lie about what had transpired.

With respect to the May 30, 2006 incident, the Respondent acknowledged that although he notified the [REDACTED] Police Department he never made a notification to the Department.

During questioning by the Court, the Respondent stated that while he was struggling with the camera with his wife, the back side of his left hand struck her. He stated that it was not the palm of his hand that came in contact with her.

During re-direct examination, the Respondent testified that he had two hands on the camera and Debra also had two hands on the camera. He stated that he released his right hand from the camera but his left hand was still on the camera and the camera lens was facing toward him. The Respondent said that the next thing that happened was that the camera went in the direction of Debra while his hand was still on it and it hit her in the face.

FINDINGS AND ANALYSIS

Specification No. 1

The Respondent stands charged herein in that on May 30, 2006, while off-duty, he was involved in a police incident and did fail and neglect to report said incident to his Commanding Officer as required. The Respondent is found Guilty as charged. Evidence adduced at trial established that on May 30, 2006, the Respondent was driving his wife and daughter to a meeting when his wife hit him in the face while he was driving. The Respondent said he continued driving and went to the meeting. Following the meeting, Debra asked the Respondent to drop her off at her attorney's office. The Respondent explained that he felt she was going to make allegations against him in an effort to get him out of the marital home. He decided to go to the [REDACTED] Police Department and file a complaint about the incident where she struck him in the car that day. The Respondent failed, however, to report the incident and the fact that he filed a Domestic Incident Report to the Department.

The Patrol Guide addresses an instance such as this. It states in pertinent part:

When an off-duty uniformed member of the service is at an unusual police occurrence to which the uniformed member of the service is either a participant or witness

- 1. Remain at the scene of incident when feasible and consistent with personal safety.*
- 2. Request the response of patrol supervisor, precinct of occurrence.*

The Patrol Guide goes on to state that if remaining at the scene is inappropriate, the member of the service may leave the scene, but the member must promptly notify the desk officer and be guided by the desk officer's direction. In this instance, the Respondent was driving and calling a patrol supervisor to the scene may not have been appropriate. But once the Respondent made the decision to report the incident to the [REDACTED] Police Department, he had a duty to make a notification to the Department.

Accordingly, I find the Respondent Guilty of Specification No. 1.

Specification No. 2

The Respondent stands charged with engaging in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: On December 10, 2006 the Respondent engaged in an altercation with Debra which resulted in her jaw being dislocated. The Respondent is found Not Guilty. At the onset of this matter it was determined that Debra, despite being notified to appear at this proceeding chose not to appear. The end result was a hearsay case being presented against the Respondent.

The Respondent testified credibly that he was in the midst of a separation leading to a divorce from his wife, Debra, who had moved out of the marital home. On May 10, 2006 the Respondent said that Debra came to the marital home and was the aggressor on that date. When she found that her personal belongings had been removed from the house to a van she became angry. The Respondent testified that she punched him in the head. She also threw a plate at him in the presence of one of their children. This statement is corroborated several ways. First, the

Domestic Incident Report which was prepared by the responding officers of the Port Washington Police Department. (RX A). Debra signed the report which stated that when she found her belongings in the car, she threw a plate at the Respondent. Secondly, Tucker, a Department detective who investigated this incident spoke with Debra. Debra not only admitted to throwing the plate at the Respondent, but also admitted to punching him in the head with a closed fist. This is proof that Debra was the aggressor in this incident.

The Respondent further stated in a calm manner that Debra wanted the camera and he told her he would let her have it if he could just get the film it contained. There was a struggle over the camera with both of them holding onto it with both hands. The Respondent testified in a believable fashion that as they tugged on the camera, the back of his hand came in contact with Debra's jaw, striking her. Debra said in the report that as the Respondent tried to grab the camera, she was hit in the jaw on the left side of the face with an open hand.

There was no testimony that any words were exchanged between Debra and the Respondent which would support a conclusion that he struck her intentionally with an open hand while struggling over the camera. Indeed, prior to the struggle over the camera, she punched him in the head and threw a plate at the Respondent, yet he never responded in kind with force. Debra never actually stated that the Respondent slapped her in the face. Yet absent her live testimony where she would have been subject to the rigors of cross-examination, this Court is unable to conclude that the Respondent struck her with an open hand, i.e. slap. The Department investigator who investigated this matter stated that Debra was struck with an open hand. There was no mention in the report, however, of a slap and only during cross-examination was the "open hand" then interpreted to be a slap. Given the fact that this was not spelled out in any

report, this Court is unable to conclude that Debra was not struck with a back hand as a result of the struggle over the camera with the Respondent.

Moreover, the two neighbors, the O'Briens, did not come to court to testify, either. Although they did not witness the incident between the Respondent and his wife, they spoke to both of them immediately following the incident. Both O'Briens stated in their discussion with Department Investigator Hunter-Clark that they were informed that the Respondent struck Debra; it was not spelled out in what manner. It could not be ascertained from the trial testimony whether she was struck from the release of the camera by the Respondent or an intentional strike in the face. Absent the live testimony of the O'Briens, this Court is without sufficient evidence to make such a fact-finding determination. Hunter-Clark testified that she likely took notes of her interviews of the O'Briens, but she did not preserve her notes. If there was any discrepancy in the statements of the O'Briens, the notes may have clarified any questions but they were not retained. Furthermore, there were no certified medical records of Debra's injuries offered into evidence.¹ There was testimony that she sustained a dislocated mandible jaw but no evidence to support the extent of the injury.

In conclusion, the Assistant Department Advocate failed to prove by a preponderance of the credible evidence that the Respondent engaged in an altercation such that the injury which resulted should be considered misconduct on his part.

Accordingly, I find the Respondent Not Guilty of Specification No. 2.

¹ Offered into evidence were copies of purported medical records without certification. The Respondent objected to its admission and the Court sustained the objection.

PENALTY

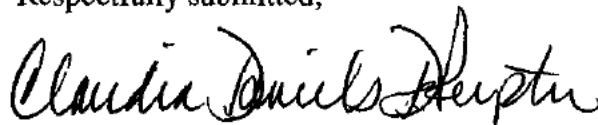
In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). The Respondent was appointed to the Department on July 28, 1987. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of failing and neglecting to report the May 30, 2006 incident he had with his wife to his Commanding Officer. The Respondent filed a report with the [REDACTED] Police Department but failed to notify the Department. In Disciplinary Case No. 80914/05 a six-year member of the Department with no prior disciplinary record, having pleaded Guilty forfeited ten vacation days. In that matter, the Respondent failed twice to notify the Department upon becoming involved in a physical domestic dispute with his wife. The first time, the Respondent and his wife were arguing about who got to watch what on the television when the wife threw the TV remote control at the Respondent, hitting him on the head but causing no injury. The second time, the wife shoved the Respondent and slapped him in the face. On both occasions, the Respondent prepared a Domestic Incident Report with the Yonkers Police Department and on one of the occasions Yonkers police officers responded to the residence.

In this matter, the Respondent only has one incident where he failed to notify the Department.

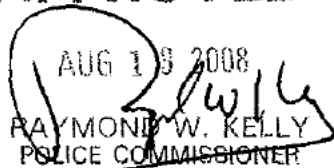
Therefore I recommend that he forfeit five vacation days.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner-Trials

APPROVED



AUG 19 2008
RAYMOND W. KELLY
POLICE COMMISSIONER